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IN THE

Supreme Court of the United States

October Term, 1964
No. 47

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, a corporation, and HOUSTON PIPE LINE COMPANY, a corporation, and EL PASO NATURAL GAS COMPANY, a corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JOINT BRIEF FOR THE PETITIONERS.

JOHN ORMASA,
W. M. OWENS,
Southern California Gas Company,
Box 3249 Terminal Annex
Los Angeles, California,
Attorneys for Petitioners,
Southern California Gas Company,

MILFORD SPRINGER,
ROBERT M. OLSON, JR.,
Southern Counties Gas Company of Calif.,
Box 2736, Terminal Annex,
Los Angeles, California,
Attorneys for Petitioner,
Southern Counties Gas Company of Calif.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Opinion Below.

The Opinion of the Court of Appeals [R. 365-376] is reported at 323 F.2d 190.

Jurisdiction.

The Judgment of the Court of Appeals for the Fifth Circuit was entered September 24, 1963 [R. 377]. A timely Petition for Rehearing was denied on December 17, 1963 [R. 379]. The Joint Petition for a Writ

of Certiorari was filed March 13, 1964, and was granted June 1, 1964 [...., U.S. ...., 12 L. ed 2d 496]. [R. 381]. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1). See also Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

Statute Involved.

Section 717 of the Natural Gas Act is the statute involved; Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§717-717w (1958), and is set forth as Appendix A, *infra*, page 1.

Question Presented.

The basic issue to be determined is whether the jurisdiction of the Federal Power Commission follows the *actual flow* of a commingled supply of natural gas from Texas to California in interstate commerce for resale, or whether this jurisdiction may be avoided by a *contract provision* which, while recognizing the actual flow, provides that for *contractual purposes* this commingled supply of gas shall be used for nonjurisdictional purposes.

Statement of the Case.

Petitioners herein were Intervenor-Respondents in the court below and were also Intervenors before the Federal Power Commission in its Opinion No. 348 (26 F.P.C. 606).

For the purposes of this Petition, we accept the facts as found by the Federal Power Commission and which are set forth in its Opinion No. 348 [R. 254-277].

El Paso Natural Gas Company (El Paso) is a natural gas pipeline company with an interstate pipeline system extending from its origin within the State of Texas to the State of California. El Paso proposes to increase its sources of supply, by obtaining gas from south Texas, through contracts which it has entered into with Houston Pipe Line Company (Houston) and Lo-Vac Gathering Company (Lo-Vaca). In order to obtain the gas from these sources, it will be necessary to extend the El Paso interstate pipeline system from Sonora in west Texas eastward to Three Rivers, Texas. It is proposed that El Paso Gas Supply Company, a subsidiary of El Paso, build the 227.6-mile 30" pipeline required for this purpose. Both Houston and Lo-Vaca would deliver their contracted supplies of gas to El Paso at Three Rivers, Texas. At this point, the Houston and Lo-Vaca gas would enter the El Paso Natural Gas Company interstate pipeline system as extended.

The Federal Power Commission found that the gas to be provided by Houston and by Lo-Vaca, pursuant to the contracts which are the subject of this proceeding, would form part of a commingled stream of gas flowing from Texas through New Mexico and Arizona into California, and the commingled stream of gas would physically be used to supply El Paso's customers gas which would be in turn resold by them in interstate commerce. The contracts under which those gas supplies would be furnished provide in

essence that the gas is to be used for nonjurisdictional purposes. Despite the contractual provisions, the gas would actually flow as heretofore described. None of the parties herein has at any time claimed that the gas supplied by Houston and Lo-Vaca would not physically flow in interstate commerce for resale. Respondents contend, however, that the contractual provisions for nonjurisdictional use of the commingled gas prevail over the admitted flow and sale of the gas in interstate commerce for resale. The majority opinion in the court below conceded that this Houston Lo-Vaca gas would actually be resold in interstate commerce. The decision states at page 191 of 323 F.2d:

> "The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted . . ." [R. 367].

Despite this, the majority opinion held that the contractual provisions circumvented the jurisdiction of the Federal Power Commission.

ARGUMENT.

I.

The Flow of Gas in an Interstate Pipeline System as Part of a Commingled Supply of Gas Destined for Resale in Interstate Commerce Subjects Such Gas to the Jurisdiction of the Federal Power Commission.

Gas to be provided by Houston and by Lo-Vaca under and by virtue of their contracts here in question with El Paso,

> ". . . inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, . . ." [R. 211].

The majority opinion in the lower court concedes on page 191 of 323 F.2d that:

> ". . . the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted. . ." [R. 367].

The jurisdiction of the Federal Power Commission applies to:

> ". . . the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale. . ." (15 U.S.C. §717(b)).

In the case of *F.P.C. v. Natural Gas Pipeline Company* (1942), 315 U.S. 575, 86 L. ed 1037, this Court stated:

> "The sale of gas originating in one state and its transportation and delivery to distributors in any

> other state constitutes interstate commerce, which is subject to regulation by Congress." (315 U. S. 575, 582)

Accordingly, the basic facts are: Because gas to be sold under the contracts in question "inevitably would be physically transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California," it is the duty of the Federal Power Commission to carry out the purpose of the Natural Gas Act by exercising its jurisdiction over the sales for resale in interstate commerce involved in each of the contracts here in question.

Any lingering doubt which could have existed that this is so, has been completely dispelled by the decision reached by this Court in the case of *F. P. C. v. Southern California Edison Co.*, (1964), 376 U.S. 205, 11 L. ed 2d 638. In that case, commonly referred to as the *Colton* case, this Court reversed the decision of the Court of Appeals for the Ninth Circuit, and affirmed a finding and decision by the Federal Power Commission that because out-of-state energy from the Hoover Dam in Nevada was included in the energy delivered by Southern California Edison Company to its customer, the City of Colton, California, the Federal Power Commission had jurisdiction over the sale of electrical energy as a sale in interstate commerce for resale. In reaching that conclusion this Court stated:

> "We have said of Part II of the Power Act that 'federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic or governmental, test.' Connecticut Light & Power Co. v. Federal Power*

Comm'n, 324 U.S. 515, 529, . . . (Italics supplied.)" *F.P.C. v. Southern California Edison Co.*, 11 L. ed 2d 638-643.

Moreover, any possible contention that the flow of electric energy under the Federal Power Act might be different from the flow of gas energy under the Natural Gas Act has been rejected by this Court's statement that:

> "In reviewing the court's ruling on this question we do not write on a clean slate. In decisions over the past quarter century we have held that Congress, in enacting the Federal Power Act and the Natural Gas Act, apportioned regulatory power between state and federal governments according to a test which this Court had developed in a series of cases under the Commerce Clause. *The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned; and §201(b) of the Power Act has its counterpart in §1(b) of the Gas Act, 15 USC §717(b), which became law three years later in 1938.*" (Emphasis supplied.) *F.P.C. v. Southern California Edison Co.*, 11 L. ed 2d 638, 644.

This, of course, because of the provisions of Section 1(b) of the Natural Gas Act, is why the Federal Power Commission assumed jurisdiction over the instant sales involved in the present proceeding before this Court.

Gas flowing through an integrated interstate pipeline system will be devoted to total system use. In the case of El Paso, which devotes 80 per cent of the gas which it sells to its market in California, the in-

evitable consequence is that additional gas supplies obtained by it will in major portion be disposed of by way of a sale for resale to the California market. Because the Federal Power Commission recognized these elementary facts of the operation of the natural gas business, and of El Paso Natural Gas Company as an integrated interstate pipeline company, the Commission held the instant sales subject to its jurisdiction as sales in interstate commerce for resale.

The Houston and Lo-Vaca gas supplies will flow through El Paso's interstate pipeline system as part of a commingled supply of gas destined for resale in interstate commerce. The corresponding jurisdiction of the Federal Power Commission, must and does attach. *Deep South Oil Co. of Texas v. F.P.C.*, 247 F.2d 882 and *Shell Oil Co. v. F.P.C.*, 247 F.2d 900.

Justice Rives in his dissent in this proceeding before the Fifth Circuit pointed out at page 197 of 323 F.2d:

> "In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g., Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.'" [R. 376]

It is, of course, the *Connecticut* case, 324 U.S. 515, relied upon by Justice Rives which this Court has reaffirmed recently in the *Colton* case, supra, in reaching its conclusion that Federal Power Commission jurisdiction follows the physical flow of energy in interstate commerce.

Conclusion.

For the reasons stated, we request that the judgment of the court below be reversed.

Respectfully presented,

Date: August 25, 1964.

JOHN ORMASA,
WILLIAM H. OWENS,
Attorneys for Petitioner, Southern California Gas Company,

MILFORD SPRINGER,
ROBERT M. OLSON, JR.,
Attorneys for Petitioner, Southern Counties Gas Company of California,
By *John Ormasa*

Affidavit of Service by Air Mail.

In the Supreme Court of the United States. October Term, 1964. No. 47.

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporation, Petitioners, vs. Lo-Vaca Gathering Company, a corporation, and Houston Pipe Line Company, a corporation, and El Paso Natural Gas Company, a corporation, Respondents.

State of California, County of Los Angeles, ss.

Viola Figg, being first duly sworn, deposes and says: That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for John Ormasa, William H. Owens, Milford Springer, and Robert M. Olson, Jr., who are the attorneys for the Petitioners in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, who are the printers and agents in this matter for said attorneys, and have their offices in the City of Los Angeles, State of California.

That on the 25th day of August, 1964, affiant served the within Joint Brief for the Petitioners on the Respondents in this action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Respondents at the business residence addresses of said attorneys, as follows: George D. Horning, Jr., Esq., C. Frank Reifsnyder, Esq., Harry Albrecht, Esq., Hogan & Hartson, 800 Colorado Bldg., Washington, D.C., Attorneys for El Paso Natural Gas Co.; Howard E.

Wahrenbrock, Esq., Solicitor, 441 "G" St. N. W., Washington 25, D. C., Attorney for Federal Power Commission; Hugh Q. Buck, Esq., Jefferson D. Giller, Esq., Richard L. McGraw, Esq., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of Southwest Bldg., Houston 2, Texas, Attorneys for Houston Pipe Line Co.; Bradford Ross, Esq.; Sherman S. Poland, Esq., Ross, Marsh & Forster, 725-15th St., N. W., Washington 5, D. C., Attorneys for Lo-Vaca Gathering Co.; J. Calvin Simpson, Esq., Gerald A. Laster, Esq., John Murphy, Esq., 514 State Bldg., San Francisco 2, Calif., Attorneys for Public Utilities Commission, State of California; and Hon. Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., at the county seat of said county, by then sealing said envelopes and depositing the same with air mail postage thereon fully prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 25th day of August 1964

MARGARET H. FALES
Notary Public, in and for the County of Los Angeles, State of California

My Commission Expires January 11, 1966

[Seal]

APPENDIX A.

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§717-717w (1958)) involved in this proceeding are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)].

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boun-

dary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

Sec. 2. When used in this Act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner", means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U. S. C. § 717a]

Sec. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes,

or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f-(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further

proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. §717f(d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate

shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. 717f-(e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. §717f(f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. §717f(g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U.S.C. §717f(h)]

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time with-

in which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. §717o]